

March 8, 2021

The special meeting of the Mayor and Council of the Borough of Bay Head was conducted on March 8, 2021 at 5:00 pm using the GoToMeeting platform.

Mayor Curtis call the meeting to order, thanked everyone for joining this special meeting, concerning the cellular issue in town.

Tonight, we will attempt to go through the meeting as usual. There are two public comment sessions scheduled as part of this meeting. One for the resolutions and one during the public discussion portion of the meeting. At the appropriate time, I will open the floor to public comment. If a member of the public wishes to comment they must state their name. I will recognize each person separately and relinquish the floor to that person. Once I have relinquished the floor, the person who wishes to comment must once again state their name and provide their address for the record. I will continue this process until all comments are heard. I will then close the floor to public comment and move to the next item on the agenda.

Mayor Curtis asked everyone to stand and join in the Pledge of Allegiance to the Flag.

Mayor Curtis read the following statement:

Ladies and gentlemen, pursuant to the applicable portions of the New Jersey Open Public Meetings Act, adequate notice of this meeting has been given. Notice of this virtual meeting was published in the *Ocean Star* and *Asbury Park Press* on March 5, 2021 and posted on the bulletin board at 83 Bridge Avenue on March 2, 2021.

The roll was called for attendance. Present were Mayor Curtis, Councilmembers Gates, Cornell, Barnes, Shaning, MacPherson, Lyons; Borough Administrator, Christopher Parlow and Borough Attorney, Jean Cipriani.

Mayor Curtis appointed Paul Benziger to the Environmental Commission. Councilmember Lyons moved to approve Mayor's appointment to the Environmental Commission. The motion was seconded by Councilmember Barnes and passed on roll call vote: YEAS: Gates, Cornell, Barnes, Shaning, MacPherson, Lyons. NAYS: None.

Councilmember Lyons offered the following Resolution to go into Executive Session.

RESOLUTION OF THE BOROUGH OF BAY HEAD, COUNTY OF OCEAN,  
STATE OF NEW JERSEY EXCLUDING THE GENERAL PUBLIC FROM A  
MEETING PURSUANT TO THE OPEN PUBLIC MEETINGS ACT

WHEREAS, the Open Public Meetings Act, N.J.S.A. 10:4-12, permits the exclusion of the public from a meeting in certain circumstances; and

WHEREAS, this public body is of the opinion that such circumstances presently exist.

NOW, THEREFORE, BE IT RESOLVED, by the Borough Council of the Borough of Bay Head, in the County of Ocean, State of New Jersey, as follows:

1. The public shall be excluded from discussion of an actions upon the hereinafter specified subject matter.
2. The following subject involve:  
Litigation – New Jersey Transit
3. It is anticipated at this time the above stated subject matter will be made public in 30 days.
4. This Resolution shall become effective immediately.

The motion was seconded by Councilmember Barnes and passed on roll call vote: YEAS: Gates, Cornell, Barnes, Shaning, MacPherson, Lyons. NAYS: None.

The time for the public to rejoin the meeting was discussed, deciding to have the public rejoin at 5:35 pm.

The Governing Body went into Executive Session at 5:05 pm. At 5:36 pm they came out of Executive Session.

Mayor called the meeting back to order and asked for a roll call.

The roll was called for attendance. Present were Mayor Curtis, Councilmembers Gates, Cornell, Barnes, Shaning MacPherson, Lyons; Borough Administrator, Christopher Parlow and Borough Attorney, Jean Cipriani.

Ms. Cipriani: The Borough has been in ligation, for well over a year, with residents and Save Barnegat Bay in trying to stop and/or alter NJ Transit plan for the proposed substation. We did receive a stay from the court to have them appear before the Bay Head Planning Board, which they did. Other stays have been denied and they have now submitted a settlement agreement. It is not likely we would receive a stay and one hasn't been granted since the Planning Board hearing by Superior Court. I apologize for having this meeting without having the full agreement but we need to give an answer by March 11<sup>th</sup> or the offer is off the table. If the agreement is not approved they can build exactly has it has been approved. The concessions if approved are:

1. Reduction of the exterior façade of the new substation building, which will involve an 8-foot-tall fence screened with appropriate shrubs in place of the walls and roof currently planned for enclosure of the transformers.
2. A natural gas generator instead of the planned diesel generator for the site.
3. Continued coordination with the Borough on truck routes.

4. NJ Transit will accommodate reasonable request to reduce work hours during holidays and special events in the Borough. On site construction will be limited to weekdays (no nights or weekends).
5. NJ Transit will furnish a timeline with a description of remedial activities that have occurred on-site from 2003 through present as well as future projection of on-site remedial activities.
6. NJ Transit will provide a copy of the FTA grant received for the Project.
7. NJ Transit will provide the construction schedule timeline.

The FTA grant is important to understand the elements of this project. The power lines are being funded by this grant and anchors the money for this project. They won't take the power lines to a different site or underground.

The last element is cedar shakes on the proposed building. NJ Transit will not object but have been advised they can't go back to Historic Preservation. They will not object if we obtain the approval.

I would recommend a resolution by title authorizing the settlement agreement in the form acceptable to the borough attorney be offered and seconded.

Mayor Curtis: Thank you Jean. Do I have a motion?

Councilmember Lyons move to approve the resolution by title authorizing the settlement agreement in the form acceptable to the borough attorney. The motion was seconded by Councilmember Barnes.

Mayor Curtis opened the meeting to the public for discussion on the resolution.

Edward Nolan, 89 Osborne Avenue: Thanks to everyone who have helped with this project. NJ Transit has proven themselves not to be a good neighbor. They have not complied with remediation for the last 20 years. Will we have oversight on this project – an independent review to monitor what is going on without making modifications that no one is aware of.

Ms. Cipriani: No – right now we do not have the full plans and contract. The Borough lacks the authority to hold them to those plans. As part of the agreement we will obtain plans and the contract. If they do work contrary to the contract approved, we would have to go to court.

Mr. Nolan: Will there be any oversight conducted within NJ Transit?

Ms. Cipriani: They will self-monitor their own project to make sure they are getting contract compliance from their contractor. If there is a change order, we will have no internal mechanism in order, to do that we would have to have plans. You are our eyes as to what is occurring on site. We would need information first to go to court or DEP to say they aren't complying with their plan. They still don't have their water discharge permit from DEP. This is being challenged by Save Barnegat Bay. That is a separate permit and won't stop the work that is currently occurring.

Mr. Nolan: I have a major concern – we haven't been given plans or a construction schedule – we are partnering with NJ Transit – this is a big concern of mine. If we do have a concern, do we have a direct contact with NJ Transit to reach out to them?

Ms. Cipriani: No – we should have a construction schedule – it is one of the terms of the agreement. In terms of them allowing us to inspect – I would be shocked if they would do that.

Mayor Curtis: We have had contact with representatives of DEP and some higher ups at NJT who we can reach out to. Hopefully they would be responsive. In terms of a large scale violation, we would bring it to them first or the appropriate entity.

Ms. Cipriani: If we have a settlement agreement we will have the plans and contract. In the absence of that we will have to obtain an order to show cause.

Mr. Nolan: I am a visual person and would love to see what NJT is proposing with the modifications, as well as the settlement agreement along with the remediation.

Ms. Cipriani: I agree with you. We asked them to provide something to present tonight as to the reduction, but we don't have it. It is a requirement for the final agreement as an exhibit. When it is received, it will be provided to you through the website or for pick up at Borough Hall. We are working on it but it hasn't come in.

Mr. Nolan: I understand; I feel we shouldn't be settling. There are environmental issues, the impact on the bay, the proposed building will be the largest on the barrier island. Issues have been raised as to DEP, EPA – I don't understand why we have to settle.

Mary Carol French, 53 North Street: With the water discharge – we need to file a freedom for information act. They haven't provided us with information but they want us to sign off. I feel like we have a gun to our head. Let's get some film of their property – 24-7 to record what they are doing. We need to take this to the local press. Thank you for fighting the good fight.

Jessica Weingroff, 155 Osborne Avenue: You talk about the environmental impact and the discharge of water. We have things going on in town that has more of an environmental impact – 174 Twilight Road. I don't think they should be doing this project – say no to NJT.

Sue Shore, 128 Osborne Avenue: I live near the railroad tracks and the power poles will be within 20 feet of people's home. Many years ago they also tried to get a project through, they failed. We hired an attorney, Chris Smith spoke opposed to the project and the project was shot down. My concern is that Bay Head hasn't been given a fair chance. Have we contacted the Board of Public Utilities, has Point Pleasant Beach been notified? We haven't been notified as

residents – you should postpone a decision until all avenues have been exhausted.

William Furze, 2 Wyndham Drive: I am a resident in Bay Head and a neighbor to NJT. The settlement offer has ignored all of the know contaminated sites on their property without doing any remediation. Ms. Shore mentioned the utility poles 50' high to be placed west of the tracks. There have been no concessions regarding that. Natural Gas generators comes with a maybe. As to cedar shakes – I see that as a good thing because NJT doesn't maintain anything. Once again the list of concerns has been ignored.

Patricia Kruger, 218 Osborne Avenue: So if there is a settlement breach we have to go to court. I am an attorney – I don't want to go to court. I would prefer to go now. They will break it anyway. The settlement agreement doesn't give us anything concrete. I feel we can only go to court.

Ms. Cipriani: We have taken a number of concerns to court. Notification, poles, environmental issues. We have been in litigation approximately a year and have gotten a variety of stays. We went from superior court to the appellate court and those concerns were not taken up. I would prefer court to an arbitrator.

Ms. Shore: I would like to know why it wasn't necessary for us to be notified – is the Mayor of Point Pleasant Beach involved with this?

Ms. Cipriani: I feel you should have been notified but the court didn't feel the need to make NJT reapply to CAFRA on that issue.

Ms. Shore: I feel we would have more power behind us if the Mayor of Point Pleasant Beach is involved. The town owes it to the citizens to fight. The last stand of hardwood trees on the barrier island are where the poles will be located. This really deserves more discussion – this town doesn't need to be a victim.

Bev Furze, 2 Wyndham Drive: Thanks to those who made comments. I have heard some concern over the amount of money being spent – you can't put a price tag on this effort. Our first meeting with NJT was 12-11-202 and they came back with the best and final offer. They aren't trying to work with us.

Mr. Brennan: I understand we have gone through our last chance for a stay. Is the delay or stop on this only a budgetary concern?

Ms. Cipriani: There isn't a decision in terms as to what happens next. If the Borough doesn't settle the question is what are the next steps. We could continue on the path trying to get the construction stopped which the only mechanism is a stay. We would make application to superior court. I want to say we have expressed these issues previously but we can make another attempt. If they say no we could appeal to the appellate court. The appellate court is the most likely to act on the notice issue but they have already rejected that. The court doesn't feel they can support a stay when NJT has DEP approval and they won't get into that.  
If we don't settle that is the path to continue.

Mr. Brennan: How about a referendum to continue with the increase in cost. Also, Warren Place is being used as construction access daily. I am not sure if that is what they are supposed to be doing.

Mayor Curtis: We will investigate that. Our police have been assured that is not a construction entrance for the proposed substation.

Mr. Brennan: They were Maser engineering trucks.

Chief Hoffman: I was over there today and in contact with the yard supervisor, that access is only used by NJT employees that can't get through the other side. It is not to be used for the construction, they should access down Twilight Road.

Arigo Conti, 528 West Lake Avenue: I have been in Bay Head since December 1974 – I know Bay Head and remember the fight with NJT. There were a lot of promises but you can't trust them. They do what they want. We are getting out of the oil business and every nation in the world is going to be out of gas for their cars in 2030. Oil will not always be there to use.

Britta Wenzel, Save Barnegat Bay, 117 Hanes Road, Toms River: Save Barnegat Bay is represented by Michele Donato and we currently are not a party to this settlement agreement. I would agree that we don't trust NJT. We are partners in this litigation but since we haven't seen the action that follows the written words we are reluctant to sign off on that. We will continue to fight for Twilight Lake. I would hope that whatever the results and this project continues that we will continue to partner with Bay Head and agree to monitor the water in Twilight Lake to make sure that we know that is entering the lake by outside funding or grants. What really should be happening is that NJT should remediate for pollutants and commit to that now. They committed to that before but they should clean up before additional work is done.

Ms. Cipriani: Regarding any on going partnering with Save Barnegat Bay, the Borough is also concerned with the environmental impact to Twilight Lake. As to this agreement, Michele Donator is aware of this settlement agreement and that it doesn't include Save Barnegat Bay nor does it include Bev Furze. They may continue.

Nitta Ritter, 665 East Avenue: Twilight Lake is central to all of us. I know it is costly but I don't believe in rolling over. I can't imagine settling and I think the majority feel the same way. Thank you for your time and effort.

Ms. French: Please don't sign the settlement agreement.

Lisa Baney, 421 Lake Avenue: I won't repeat what others have said. This is something you can't undo. We have to figure out some way to stop this. I worked with others to stop a hospital expansion up north. After 10 years they move the project to another location. We can do things if we stick together. Twilight Lake is a cherished site for all of us. Thanks to Save Barnegat Bay – if they care enough to fight shouldn't we also be doing something to stop this project.

Jon Younghans, 66 Mount Street: We all love Twilight Lake, you can't undo what gets done. Fuel is on its way out so this is only a short-term fix. I agree with all the folks but you guys know more than we do. They are offering up a settlement but they haven't kept their word in the past. We should hold their hand to the fire and get the site cleaned up now. I say no to the settlement.

Ms. Cipriani: If we say no the project is presently underway. They haven't started on the power lines and time is very tight. The offer is a reduction in the building, natural gas for the generator, and some controls on construction activities. Those are the things that we may lose. We could file for a stay but thus far they have been denied. We have been in litigation and they have lost years with those delays but now they are underway. I understand they haven't abided by the word but we will make this agreement as specific as possible with time lines. We could lose these things and maybe we can get a court to intervene but we haven't been able to get that done to date.

Ms. Wenzle: We are asking that the remediation be done now but they aren't willing to do that. As per the agreement they will provide a list of the remediation activities going forward.

Maria Ritter, 725 Mount Place, Point Pleasant: Is the reduction of the building 45 sq. ft.?

Mr. Parlow, Borough Administrator: 45 linear feet of frontage.

Ms. Ritter: Do they have permission to switch from diesel to natural gas?

Ms. Cipriani: The DCA permit allows for natural gas – NJNG has also confirmed there is capacity to do so.

Ms. Ritter: Do they have to follow Borough ordinances?

Ms. Cipriani: Not entirely – it depends on what ordinance. They don't need a construction permit from Bay Head nor can Bay Head issue a stop work order. As to noise and work hours there are cases on both sides. A complaint would have to be filed in municipal court but that is not an effective way to proceed.

Ms. Ritter: With remediation – have they complied with our OPRA requests?

Ms. Cipriani: The remediation schedule will create a schedule of what has been done and what they will do going forward. OPRA is only a request for documents.

Ms. Ritter: They haven't done what they were supposed to do.

Ms. Cipriani: If they create a document with dates and what they are going to do – that is something we haven't had before – in the old agreement. This agreement will be more specific.

Ms. Ritter: I beg you not to settle. What assurance do we have going to court will force them to do what they haven't done in the past?

Ms. French: They have always acted in bad faith. They have never done what they are supposed to do and they are only steam rolling us. I feel we could raise money independently to fight this. They don't care what we want or about the environment.

Mr. Conti: Why don't you come up with a referendum to show the court and NJT what the people want.

Ms. Cipriani: You can always do a referendum, but you don't have the time and it would be difficult to phrase. The Borough has been fighting for the last year. Construction has begun. If we don't sign time is very tight. The stays have expired and they have started construction.

Mayor Curtis: We seem to be repeating certain things. You have given good arguments. Council will have to think long and hard on this before they vote. I for one feel pushed into this. We asked for a response back in December from them.

Andy Frizzell, Bay Avenue: As a citizen, I am willing to take an increase in my taxes to fight this issue.

Councilmember Lyons: I hear you not to settle but at the same time NJT is moving forward with construction. I feel absolutely certain that we don't have the ability to get another stay. If they are just going to build it, I would like to have a little control. If we can get a stay it would only be temporary.

Ms. Cipriani: You can go back to court for a stay but you have to say why you are entitled. We could look at the placement into the wetlands but they have deferred to DEP on that issue and it has also been acceptable to CAFRA. I do not think we will get a stay on the construction of the building as to size and location. The environmental concerns are moving forward in their trying to obtain the water discharge permit, which they don't have. If you don't settle they will build to the current plan as to size and location.

Power line and poles – we haven't been successful to get a stay on that. The only way to deal with that was the lack of notice for the CAFRA application but that has been through the court and they didn't make them reapply to CAFRA.

Jenny Landers, 642 Lake Avenue: I know it is a long shot on fighting the power lines and that the building will be big and ugly but I am happy they are making some concessions. I think we should fight to do the best for the lake. The electrical lines are really scary to me.

Ms. Furze: Building – by reducing the exterior façade they aren't taking away the back wall. The height will also be the same. I am also not convinced it will cover the transformers.

Councilmember Cornell: I understand everyone wants us to keep fighting. The money is not the point. We have exhausted the fight. Even if we do, the building will continue and it may be done before we finish the fight. We may end up with the original plan without any concessions. Is it worth the fight?

Councilmember Shaning: We have an offer on the table. We have gained certain things through the litigation. If we don't accept we have to start from scratch. I hate that this is happening but based on everything that I know – it is going to happen. NJT is not going to budge – it is a take it or leave it. I have heard all of you and it makes sense but our odds of winning anything else is very slim. At what point have we reached the point of diminished return. Correct me if I am wrong.

Ms. Cipriani: This is what the offer is. What are the options right now – go back and tell them no because people don't believe you will do what you say. They will then go to work and they will continue. Your concerns have been legal issues before the court and they have said they don't have jurisdiction. So then we try and find another avenue. Maybe at some point they will concede but I feel certain they will never concede on the power line because it is driven by the Federal Grant they received to do this project. The Council has a decision to make tonight: 1. Approve the agreement as is. 2. Say no and take your chances with the court. We could keep applying for stays but we have a very short time to respond. 3. We didn't receive the rendering so we might get another week to decide but there are no other items.

Councilmember Shaning: So, the most we can hope for is a delay.

Ms. Nina Ritter: The bottom line is we have to be a pain in the ass. If we are willing to spend the money those items may be put back on the table. If we are going to hang in there we will get some small concessions. I understand it costs money to go back for a stay. They aren't going to listen to us if we aren't difficult. I don't think they have given us so much.

Ms. Cipriani: This is not a decision for me to make. Concessions have been given. We have been a tremendous pain for a year. We have had three stays. I have gone to superior court and the appellate court and we succeeded in having them appear before the Planning Board.

Ms. Ritter: We still have the environmental issues and we could get other concessions.

Ms. Cipriani: That is part of the risk but there are no guarantees. The attitude they have taken with Bay Head is that they don't have to settle. The settlement is recent. If there is no settlement agreement we risk them going back to the original plan.

Ms. Baney: I understand Councilmembers Shaning and Cornell. Have we done the public approach?

Ms. Cipriani: There has been some coverage. We have had meetings at the church and those meetings were covered by the press.

Ms. Landers: Can we tie remediation to the toxic waste? We should tell them they have promised and didn't produce in the past.

Kathleen Tell, 137 Bridge Avenue: We are dealing with a bully with low creditability. Their concessions are small. Don't sell your soul for the environmental sensitivity of the land. Go down fighting. We can set up a go fund me page. You can't trust this bully.

Mayor Curtis: How many of you were at the church a year and half ago. They reported they only remediated 25% of what they were suppose to do from the 2003 agreement. We don't have the time line as to what they say they will remediate or if it has been tested. I feel we should fight to get the remediation done before they put up the new building.

Darrell Webster, Lake Avenue: Water discharge – We have to stand up to them. I don't know the ins and outs.

Ms. Shore: 20 years ago NJT proposed a structure to house 12 trains tracks. The whole town was organized and we hired an attorney. People signed up, we had protests and we beat NJT. We might be able to again. Don't you value your home and life here?

Ellen Hartgers, 56 Karge Street: I appreciate, Kay Tell, Jenny Landers, Jon Younghans for their comments. We have to stand up to the bully. We need to protest, get this on the news, collect donations but do not settle.

Mr. Nolan: In the very beginning, one year ago I knew it would be an up hill battle and we are trying to catch up. If we can be a nuisance and have a good cause we can prolong this. We need to show them we will not go away. What have they really given us? My feeling is the longer we can continue with some agency we may win.

Ms. Shore: 20 years ago NJT let the town know they were going to build a huge facility. They notified only the people within 200 feet of their property. Bev came to me, we went to the Mayor and the town knew nothing. The administration changed and we approached the new Mayor. He joined in and we asked people to sign up to help. This was free help from the citizens. Letters were written to DEP NJT, environmental groups. They didn't build plus they removed all fueling from Bay Head to another location. They didn't like us be we fought for our town.

Janet Malone, Bay Avenue: I agree with the PR blitz. We should plan an attack. It is wonderful how the neighbors are helping. I didn't know the pilings were going in. The fight should be expanded to other towns.

Ms. Baney: I am happy to volunteer with the media relations side. What would be the means to form a small group of citizens to work on this.

Ms. Cipriani: If the resolution is approved then, the Borough as an entity settled but that doesn't bind community groups. They can go to the media, DEP, political figures only the Borough would be barred from litigation. If the resolution not approved in the form presented as things progress they may come back. It is not appropriate to table this because it has been moved and seconded.

There being no further comments or questions Mayor Curtis closed the public comment portion of the meeting on the resolution.

Mayor Curtis called for vote on the resolution to settle the agreement by title only.

YEAS: Barnes

NAYS: Gates, Cornell, Shaning, MacPherson, Lyons.

Mayor Curtis opened the meeting for public comment on any topic.

Bev Furze: Thank all of your for supporting us.

Jenny Hunziker-Kelber, 162 Woodland Avenue: Thank you for your vote and hard work. I am willing to help any way I can just reach out to me.

Ms. Shore: Council got behind us the last time and the whole town fought. Bev and I were assigned to lead and were oversaw by Councilmember John Berko. We didn't do it alone. The town is appreciative that you have listen to the citizens and we want to be involved.

Mayor Curtis: We can have a sign-up sheet in the foyer of Borough Hall.

Bev Furze: Last time we went door to door – we can discuss on line and get organized.

Maria Ritter: I will be happy to help.

Ms. Tell: We need to set up a Facebook page – how about Twilight Lake Warriors?

How about All Aboard?

Ms. Shore: We were the Concerned Citizens of Bay Head the last time.

Ms. Tell: I just made a public group so people can provide contact information.

Councilmember MacPherson: Maybe Point Pleasant Beach can get involved, especially the neighbors behind you on Osborne Avenue. This has been a long year since the meeting last February. We made a list but didn't get very far with answers from NJT. I am excited to see all the people speak out and want to put up a fight. We worked hard and a lot of money has been spent. I hoping with all of us working together we will get something done.

Councilmember Shaning: A great job by Jean and Bill Sullivan. If you as a group have another approach talk to us.

Ms. Cipriani: Thank you for your kind words.

Ms. Maloney: Why didn't residents receive an alert for the report by the task force committee for the cell tower or the balloon tests?

Mayor Curtis: Everybody should have known about the Task Force it was discussed in a number of council meetings but you are correct there wasn't an alert nor was there one for the balloon tests.

Ms. Maloney: It is my understand the task force report was presented and voted on at the same meeting.

Mr. Parlow: The agenda an attachments are posted on the website prior the council meetings.

Ms. Maloney: I certainly received a number of notices for this meeting. I am concerned about notifications – it is important to get notification.

Ms. Baney: I want to commend council for utilizing the notification method and I am sure it will be done again in the future.

Mayor Curtis: We have a new notification system – there were a few glitches and that is why numerous notices went out for this meeting. I am sure it will be a lot better going forward.

There being no further business, Councilmember Lyons moved the meeting be adjourned. The motion was seconded by Councilmember Barnes and passed on roll call vote. YEAS: Frizzell, Cornell, Barnes, Shaning MacPherson, Lyons. NAYS: None.

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Patricia M. Applegate, Municipal Clerk

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William W. Curtis, Mayor